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Dennis R. Cook v. Christiansen Bros. Inc., Montmorency, Hayes & Talbot Architects, Inc., MHT Architects, Inc., and Halverson Plumbing & Heating, Inc. : Brief of Respondent

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

DENNIS R. COOK, Plaintiff/Appellant, vs. CHRISTIANSEN BROS. INC., a Utah corporation; MONTMORENCY, HAYES & TALBOT ARCHITECTS, INC., a Utah corporation; MHT ARCHITECTS, INC., a Utah corporation; HALVERSON PLUMBING & HEATING, INC., Defendants/Respondents:	Case No. 860511 Priority No. 13(b) 88-0126-CA

BRIEF OF RESPONDENT VAN BOERUM & FRANK ASSOCIATES, INC.

APPEAL FROM SUMMARY JUDGMENT, SEPTEMBER 3, 1986
SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY
HONORABLE DAVID ROTH, DISTRICT JUDGE

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LIST OF ALL PARTIES

Plaintiff-Appellant:	Dennis R. Cook
Defendants-Respondents:	Christiansen Brothers, Inc. Montmorency, Hayes and Talbot Architects, Inc. MHT Architects, Inc. Halverson Plumbing and Heating, Inc.
Third-Party Plaintiff:	Montmorency, Hayes and Talbot Architects, Inc.
Third-Party Defendant-: Respondent	Van Boerum & Frank Associates, Inc.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the district court err in finding as a matter of law that the alleged negligence of defendants in placing a drinking fountain eighteen inches from an oil floor drain in an automotive center was not the proximate cause of plaintiff's injuries.

STATEMENT OF THE CASE

A Complaint for personal injury damages was filed in the Second Judicial District Court of Weber County, State of Utah by plaintiff Dennis Cook, against defendants Christiansen Brothers, Inc., Montmorency Hayes & Talbot Architects, Inc., MHT Architects, Inc. and Halverson Plumbing and Heating. Montmorency, Hayes & Talbot Architects, Inc. filed a

Third-Party Complaint against third-party defendant Van Boerum & Frank Associates, Inc.

Plaintiff alleged in his Complaint that he was injured in a fall at the Sears Automotive Center at the Newgate Mall, Ogden, Utah while working as an employee of Sears, Roebuck and Company and that the fall was "the proximate result of negligent design, construction in and placement of a drinking fountain . . . ." (R. 1). Defendant Christiansen Brothers, Inc. was the general contractor for the Sears Automotive Center at the Newgate Mall (R. 113), defendant Montmorency, Hayes & Talbot Architects, Inc. was the project architect (R. 113), defendant Halverson Plumbing and Heating was the mechanical subcontractor on the project and third-party defendant Van Boerum & Frank Associates, Inc. was the mechanical engineer on the project.

By stipulation, plaintiff dismissed without prejudice its claims against Halverson Plumbing and Heating. (R. 39-40). Plaintiff's claims against defendant MHT Architects, Inc. were dismissed on Motion. (R. 74).

Christiansen Brothers, Inc. and Montmorency, Hayes & Talbot Architects, Inc. filed Motions for Summary Judgment seeking the dismissal of plaintiff's Complaint. Van Boerum & Frank Associates, Inc. filed a Motion for Summary Judgment

pursuant to Rule 14, Utah Rules of Civil Procedure, joining in the motions of Christiansen Brothers, Inc. and Montmorency, Hayes & Talbot Architects, Inc. with regard to the dismissal of plaintiff's Complaint and also filed a Motion for Summary Judgment seeking the Dismissal of the Third-Party Complaint.

The Motions for Summary Judgment were argued before the Honorable Judge David E. Roth on August 20, 1986. Judge Roth granted defendants' and third-party defendant's Motions for Summary Judgment. Summary Judgment was entered in favor of defendants and third-party defendant on September 3, 1986. Plaintiff filed a Notice of Appeal from the Summary Judgment entered in favor of defendants.

STATEMENT OF FACTS

Plaintiff, Dennis Cook, was employed by Sears, Roebuck & Company as the Assistant Manager of the Sears Newgate Mall Automotive Center in Ogden, Utah. (Cook Deposition at 3, 4.) It was plaintiff's responsibility to supervise the activities of the 15 to 16 mechanics who serviced the 50 to 60 automobiles served by the facility each day. (Cook Deposition at 4, 25.)

The Sears Automotive Center at the Newgate Mall is a rectangular facility with service bays along the length of the structure on the north and south sides, 10 service bays on each

side. (Cook Deposition at 28.) Approximately in the middle of the automotive center along the north wall in the immediate vicinity of two service bays a water fountain approximately 38 inches to 40 inches in height was installed next to the wall. (Cook Deposition at 5, 8.) Along the same north wall to the east about 18 inches from the easternmost side of the drinking fountain was an opening in the concrete floor approximately 12 inches by 12 inches which was used as a floor drain for disposing of engine oil and automatic transmission fluid drained from automobiles during servicing. (Cook Deposition at 5, 46.) The employees under plaintiff's supervision drained engine oil and automatic transmission fluid from automobiles into "waste-oil containers" which were about 3-1/2 to 4 feet tall with a bucket built on top to catch the oil and other fluids as they were drained from automobiles. (Cook Deposition at 21.) The containers were capable of storing approximately six oil changes. (Cook Deposition at 46.) After a container was full, the mechanics would drain the container into the floor drain by rolling the container over the floor drain and opening a petcock at the bottom of the containers. (Cook Deposition at 5, 21, 46.) The mechanics would occasionally partially miss the floor drain while emptying the containers, spilling oil on the concrete floor around the drain.

Generally, the mechanic who dumped the oil would wipe up after any spills in the vicinity of the drain and store maintenance cleaned the entire shop each evening. (Cook Deposition at 29.)

The "waste-oil containers" always leaked oil around the petcocks and around the seal at the bottom of the containers. (Cook Deposition at 9, 21, 47.) Since oil changes were done in each of the 20 service bays, the waste-oil containers were wheeled throughout the shop area during the day. (Cook Deposition at 47.) During portions of the day and on each evening the leaky waste-oil containers were stored by the mechanics in the area of the drinking fountain and floor drain. (Cook Deposition at 9, 21.)

As in each of the other service bays, the two service bays adjacent to the floor drain and drinking fountain contained hydraulic racks used for hoisting automobiles. The racks were approximately 10 feet from the north wall of the structure. (Cook Deposition at 28-29.) The hydraulic racks in these bays, as well as in other bays, leaked oil. (Cook Deposition at 21.) The two bays adjacent to the floor drain and drinking fountain, as all others, were used for changing oil. (Cook Deposition at 55.) Along the same north wall, right next to the area where the floor drain and drinking fountain were located, dispensers of 90-weight gear oil and

automotive transmission fluid were stored. (Cook Deposition at 36.) Mechanics would walk over to the area of the floor drain to get these dispensers to roll them to the service bays. (Cook Deposition at 36.) After use of the dispensers, there were some "seeps" from the dispenser hoses. (Cook Deposition at 37.) Also along the same north wall was a stand-up 55 gal. drum of 10-40 weight motor oil with a stand-up pump in it. (Cook Deposition at 37.) The mechanics would pump the motor oil into smaller containers used to add the oil to automobiles. (Cook Deposition at 38.) Occasionally, spills of oil occurred in this process, although not necessarily on the floor. (Cook Deposition at 38.)

The oil and other automotive fluids and lubricants spilled on the floor of the automotive center in the process of servicing the 50 to 60 automobiles per day was spread throughout the facility. The concrete floor was constructed of black diamond concrete and was waxed periodically by store maintenance, making it slick. (Cook Deposition at 7, 30, 44.) Oil spread very easily on the waxed concrete surface. (Cook Deposition at 7.) If a person stepped in any oil, he would track the oil throughout the shop. (Cook Deposition at 54.)

The accident occurred on a Saturday when the shop was at its busiest. "There [was] oil all over the floor." (Cook

Deposition at 6, 16, 17.) There was oil in each of the bays (Cook Deposition at 6) and plaintiff, in the performance of his duties, was "in all of the bays all day long". (Cook Deposition at 55.) Plaintiff had oil on the soles of his boots from walking through the automotive center. (Cook Deposition at 7.) This was "part of the automotive environment". (Cook Deposition at 17.)

Just before noon on November 21, 1981, plaintiff walked from the service bays to the drinking fountain. (Cook Deposition at 30-31, Exhibit 1 to Cook Deposition.) While he was stationary at the northeast corner of the drinking fountain getting a drink of water, plaintiff heard one of his men, Tom Shock, call out his name. (Cook Deposition at 31.) Plaintiff pivoted on his right foot to turn to face Mr. Shock and slipped, lost his balance, and fell to the floor striking the drinking fountain. (Cook Deposition at 7, 32.)

There was approximately an 18-inch round spot of oil on the floor just off to the east side of the water fountain and off to plaintiff's right side as he stood at the drinking fountain. (Cook Deposition at 50.) The spot could have come from one drop of oil. (Cook Deposition at 50.) Plaintiff is uncertain whether the oil came from storage of the leaking waste-oil containers in this area, from a mechanic missing the

floor drain while emptying the waste-oil containers or possibly from oil spilled from surrounding storage tanks (the 10-40 weight bulk storage tanks or the 90-weight gear oil dispenser). (Cook Deposition at 38, 47.)

Plaintiff used the drinking fountain four to five times some days, once or twice on others. (Cook Deposition at 39.) In the year that he had worked at the automotive center facility prior to the accident, plaintiff had never slipped or fallen in the drinking fountain area (Cook Deposition at 39) and plaintiff knows of no other persons who have slipped or fallen in the drinking fountain area. (Cook Deposition at 10.) However, other persons had slipped in other areas of the shop, but not all the way to the floor. (Cook Deposition at 10.)

SUMMARY OF ARGUMENT

The Honorable Judge David E. Roth did not err in granting defendants' and third-party defendant's Motions for Summary Judgment. The undisputed facts as stated in plaintiff's deposition are that plaintiff simply slipped and fell in an automotive center where oil was present throughout when he sought to pivot to face a co-worker. The fortuitous fact that plaintiff had just taken a drink at the drinking

fountain located 18 inches from a waste-oil floor drain would not permit a reasonably minded juror to conclude that the proximity of the drinking fountain to the floor drain was the proximate cause of the accident. There is no evidence that this accident would have occurred if the drinking fountain had been located elsewhere. There is no evidence of the source of the oil on the floor in the vicinity of the drinking fountain. Only conjecture and speculation would permit a reasonably minded person to conclude that the proximity of the drinking fountain to the floor drain was a cause in fact of the accident. In sum, as a matter of law, plaintiff has not satisfied his burden to prove that defendants' alleged negligence was the proximate cause of his injuries.

Plaintiff can not create an issue of fact and avoid summary judgment by filing an affidavit with conclusionary allegations contradictory of his deposition testimony. To permit, without adequate explanation, an affidavit contradictory of deposition testimony to defeat a Motion for Summary Judgment, would defeat the purpose of Rule 56, Utah Rules of Civil Procedure, to screen out sham issues of fact.

ARGUMENT

POINT I

SUMMARY JUDGMENT WAS CORRECTLY GRANTED WHERE ON THE UNDISPUTED FACTS BEFORE THE COURT NO REASONABLY MINDED PERSON COULD FIND DEFENDANTS' ALLEGED NEGLIGENCE WAS THE CAUSE IN FACT OF PLAINTIFF'S FALL AND INJURIES WITHOUT RESORTING TO SPECULATION AND CONJECTURE.

Defendants' Motions for Summary Judgment were granted because on the undisputed facts contained in plaintiff's deposition, defendants' alleged negligence in the placement of the drinking fountain 18 inches from the floor drain was not the proximate cause of plaintiff's fall and injuries as a matter of law. Judge Roth stated:

> The facts, apparently undisputed facts, are that the Plaintiff simply slipped and fell in a garage area. Had oil on his shoes. There was oil on the floor. Apparently oil all over the area of the garage.
>
> The Plaintiff claims that the causation or proximate causation of the accident was the negligent design and construction whereby the sump was located within 18 inches of the water fountain. I don't buy the argument. I don't think the sump location and the water fountain location being 18 inches apart is the cause of this accident.

Transcript on Appeal at 2, Addendum 1.

Causation (often referred to as proximate causation), an essential element of a negligence action, is comprised of two components: (1) causation in fact; and (2) proximate or legal causation. Williams v. Melby, 699 P.2d 723, 726 (Utah 1985). Conduct is the cause in fact of injury if it is a material element and a substantial factor in bringing it about. Prosser, Law of Torts 4th Ed. (1971) at 240; See, Dunn v. McKay, Burton, McMurray & Thurman, 584 P.2d 894, 896 (Utah 1978). A cause in fact is the cause "without which the result [injury] would not have occurred". Mitchell v. Pearson Enterprises, 697 P.2d 240, 245 (Utah 1985). Proximate or legal causation is a further limitation on causation which requires that the cause in fact have produced the injury in the "natural and continuous sequence (unbroken by any efficient intervening cause)." Id. An efficient intervening cause is a subsequent cause which is also a cause in fact of the injury, but which would not have reasonably been foreseen by the first actor. Hillyard v. Utah By-Products Co., 1 Utah 2d 143, 263 P.2d 287, 291 (1953), overruled on other grounds, Harris v. Utah Transit Authority, 671 P.2d 217, 222 (Utah 1983). Alleged negligence must be the actual cause or cause in fact of injury before it can be the proximate or legal cause of injury.

Ordinarily, the issue of proximate causation should not be decided as a matter of law on a Motion for Summary Judgment. Mitchell v. Pearson Enterprises, supra at 245. However, this Court has recognized that "in appropriate circumstances summary judgment may be granted on the issue of proximate cause". Id.; Jensen v. Mountain States Telephone and Telegraph Co., 611 P.2d 363, 365 (Utah 1980). This is particularly so when plaintiff has failed to present a triable issue on cause in fact. This Court has consistently held over the years that summary judgment is appropriate on the issue of proximate causation if from the undisputed facts reasonably minded jurors could find that the alleged negligence was the cause in fact of the alleged injury only through conjecture and speculation. Mitchell v. Pearson Enterprises, supra; Staheli v. Farmers' Cooperative of Southern Utah, 655 P.2d 680 (Utah 1982); Sumsion v. Streator-Smith, Inc., 103 Utah 44, 132 P.2d 680 (1943). See, Webster v. Sill, 675 P.2d 1170 (Utah 1983).

It Mitchell v. Pearson Enterprises, supra, this Court affirmed the entry of summary judgment on the issue of proximate cause in a wrongful death action brought by the heirs of a businessman murdered in his room at the Salt Lake Hilton Hotel. Although there was sufficient evidence to support a finding that the hotel had been negligent in providing security

for its guests, the physical evidence supported at least three equally probable scenarios as to how plaintiffs' decedent met his death, one or more of which would not have been prevented by adequate hotel security. This Court stated:

> Demonstrating material issues of fact with respect to defendants' negligence is not sufficient to preclude summary judgment if there is no evidence that establishes a direct causal connection between that alleged negligence and the injury . . . .
>
> In this case, plaintiffs failed to make out a case based on the specific acts of alleged negligence because there is an absence of proof that the alleged negligence was the proximate cause of Mitchell's death.

697 P.2d at 245. This Court refused in Mitchell to permit speculation or conjecture to fill the void in plaintiffs' evidence. This Court stated:

> As this Court said in Staheli v. Farmers' Cooperative of Southern Utah: "When the proximate cause of an injury is left to speculation, the claim fails as a matter of law". Therefore, since any attempt to relate Mitchell's death to the alleged negligence of the hotel in providing adequate security would be completely speculative, summary judgment was proper on that cause of action.

697 P.2d at 246.

In Staheli v. Farmers' Cooperative of Southern Utah, supra, the case quoted by this Court in Mitchell, plaintiffs sought recovery for grain they had entrusted to defendant for storage which was destroyed in a fire at the storage warehouse. The actual cause of the fire was unknown. The possibilities included arson, spontaneous combustion, negligence of the defendant, negligence of the plaintiffs or their assignors, or the negligence of transients. 655 P.2d at 682. Recognizing that it could not speculate as to the most likely cause of the fire, this Court affirmed the trial court's decision in part upon the grounds that proximate cause had not been established as a matter of law. 655 P.2d at 684.

In Sumsion v. Streator-Smith, Inc., supra, the plaintiff engaged defendant to tow his automobile to a garage for repairs. As the tow truck pulled into traffic with plaintiff's automobile in tow, plaintiff's automobile was struck from behind by a skidding coal truck. The only alleged negligence of the defendant was his failure to give an arm signal before proceeding into traffic. This Court held, in affirming a non-suit at the close of the plaintiff's case, that while there was sufficient evidence of negligence, there was not a triable issue of proximate case. There was no evidence

that the giving of an arm signal would have prevented the accident. This Court stated:

> While deductions may be based on probabilities, the evidence must do more than merely raise a conjecture or show a probability. Where there are probabilities the other way equally or more potent the deductions are mere guesses and the jury should not be permitted to speculate. The rule is well established in this jurisdiction that where "the proximate cause of the injury is left to conjecture, the plaintiff must fail as a matter of law" [citations deleted]. Many cases are cited in support of this proposition and the court quoted with approval from 29 Cyc. 625 where it stated: "The evidence must, however, do more than merely raise a conjecture or show a probability as to the cause of the injury, and no recovery can be had if the evidence leaves it to conjecture which of two probable causes resulted in the injury, where defendant was liable for only one of them."

132 P.2d at 683.

This Court's prior decisions are consistent with Professor Prosser's treatise on the law of torts. Prosser, Law of Torts, 4th Ed. 1971 at 241 states:

> On the issue of the fact of causation, as on other issues essential to his cause of action for negligence, the plaintiff, in general, has the burden of proof. He must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of

> the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

In the case at bar, the evidence offered by plaintiff as to the facts of this accident would not permit reasonably minded jurors to find that it is more probable than not that defendants' alleged negligence in locating the drinking fountain 18 inches from the floor drain was a substantial cause of plaintiff's injuries. It is undisputed that the concrete floor was waxed and slippery even without the presence of oil. (Cook Deposition at 7, 30, 44.) It is further undisputed that there was oil all over the shop the day of the accident (Cook Deposition at 6, 16) from leaking hydraulic racks in each of the service bays (Cook Deposition at 21), from leaking waste-oil containers (Cook Deposition at 5, 21, 46), from a seeping 90-weight gear oil dispenser (Cook Deposition at 37), and from oil changes occurring in each of the bays of the automotive center (Cook Deposition at 55). The following testimony summarizes the conditions in the automotive center on the day of the accident:

Q. Did you have any other spillages of oil down in that area?

A. Well, inasmuch as it was a Saturday, there is oil all over the floor. By the hole, there is usually oil or antifreeze in each of the bays in the auto center. (Cook Deposition at 6.)

* * * * *

Q. The floor was slippery at the time, I guess?

A. Well, a floor in any shop -- it doesn't matter where it is -- is always slick. It doesn't matter where you are, the least bit of oil or antifreeze is slick. It doesn't really matter what part of the shop you are in there's always something on the floor.

Q. And you always have something slippery then on your boots, then I guess?

A. Yes, I would say so. That's almost a part of the automotive environment. There is always oil. (Cook Deposition at 16-17.)

It is undisputed that plaintiff was not using the drinking fountain when he fell. (Cook Deposition at 31.) Plaintiff was not bending over the drinking fountain in a prone or unbalanced condition when he fell. (Cook Deposition at 31.) Plaintiff did not even have hold of the drinking fountain when he started to fall. (Cook Deposition at 51.) The only connection the drinking fountain had to this accident is the

fortuitous fact that plaintiff had just finishing getting a drink at the fountain when he pivoted around to respond to a co-worker and lost his balance in the course of his pivot. (Cook Deposition at 7, 31-32.)

While there was oil on the floor to the right of the drinking fountain, plaintiff does not know whether that oil resulted from the emptying of the waste-oil containers into the floor drain, or from the fact that the plaintiff and his mechanics stored the leaking waste-oil containers near the drinking fountain all night and at times during the day. Plaintiff testified as follows:

> Q. The oil that was in the area of the drinking fountain on the day of your accident could have come from those leaking tanks?
>
> A. From the leaking tanks or possibly they could have missed the drain a little bit too.

(Cook Deposition at 47.) In fact, plaintiff could not say whether the oil on the floor near the drinking fountain had "seeped" from the 90-weight gear oil dispenser or had been spilled from the 10-40 weight bulk storage tank, both of which were stored by plaintiff and his mechanics along the wall in

the area of the drinking fountain. Plaintiff testified as follows:

> Q. Okay. Are you positive that the oil that you slipped on came from someone trying to deposit oil in the drain as opposed to someone who spilt oil from the surrounding storage tanks?
>
> A. Well, as I remember, when I got up it was dirty because my clothes were dirty. It was dirty oil.
>
> Q. Well, the other oil -- the oil that comes out of the storage tanks -- once its on the floor, does it still appear clean?
>
> A. I'm not an expert on that. I don't know.

(Cook Deposition at 38.) Indeed, it is equally probable that the oil near the drinking fountain was tracked by plaintiff or other mechanics from other areas of the shop. It is undisputed that due to the wax on the concrete floor, the oil was spread widely by foot traffic. Plaintiff testified as follows:

> Q. Did you have some oil on the soles of your boots that day?
>
> A. I'm sure just walking through the auto center I would have oil or something on it. (Cook Deposition at 7.)

* * * * *

Q. I have a few more. If you would have approached the fountain at the front of the fountain as opposed to at the side -- at that corner as you described it, would you have had your feet in the vicinity of spilled oil?

A. I may have, I don't know. Now, as you know as well as I do, anybody that even touches oil is going to track it with them. So any residual oil is going to be there -- oil tracks all over the place.

Q. Right.

A. Like one drop will spread 6 inches so--.
(Cook Deposition at 54.)

The cause of plaintiff's injury was oil and lots of it everywhere and from many sources. To use plaintiff's own words, the cause of his injury was the "automotive environment. There is always oil." (Cook Deposition at 17.) It was not caused by the proximity of the drinking fountain to the floor drain. Plaintiff admits that a drinking fountain located anywhere in the shop would be surrounded by oil residue tracked by the mechanics. Plaintiff testified as follows:

Q. So everyone has oil on the bottom of their soles regardless of where you put the drinking fountain you're going to have oil residue in front of the drinking fountain, are you not?

A. That's why I said they shouldn't have done a fountain there period. Well,

anywhere that you put the -- well, if the fountain was in the customer waiting area there wouldn't have been oil up there.

Q. So you're saying there shouldn't have been any drinking fountain in any part of the auto shop itself?

A. I don't think I would put one there when I made the store.

(Cook Deposition at 54-55.) Plaintiff even admits that he was required to be in the vicinity of the floor drain during the working day to fulfill his duties and responsibilities, notwithstanding the location of the water fountain. Plaintiff testified as follows:

Q. Other than in your supervisory capacity, did you periodically go to each of the bays during the day?

A. During the day I was in all the bays all day long depending on the workload. If it was extremely busy, I tried to help the people in the shop as much as I could.

Q. So even if the drinking fountain hadn't been in the location that it was, you still would have been in the vicinity of that oil during the day; is that correct?

A. I would say so, yeh. But everybody is.

Q. Okay.

A. There is always a certain amount of oil on the floor.

(Cook Deposition at 55-56.)

It is not insignificant that during the year preceding this accident, after using the drinking fountain between one and five times a day, the plaintiff never thought that the proximity of the drinking fountain to the floor drain was a dangerous situation. (Cook Deposition at 39.); Cf., Webster v. Sill, supra.

Judge Roth's entry of summary judgment for defendants should be affirmed for the reason he stated in his ruling, "it would be a waste of time to send this case to trial". Transcript on Appeal at 2, Addendum 1. A triable issue of fact arises only when reasonable minds could disagree. Hall v. Blackham, 18 Utah 2d 164, 417 P.2d 664, 666 (1966). On the facts submitted by plaintiff, all reasonable minds must agree that plaintiff has not shown it more probable than not that the location of the drinking fountain was a substantial factor in causing this accident. To decide for plaintiff on the issue of causation in fact, a juror would be required to speculate that:

(1) plaintiff was somehow more vulnerable to slipping in oil because he had just completed getting a drink of water from the drinking fountain; and

(2) the oil on the floor near the drinking fountain was from oil which had missed the floor drain during the emptying of the waste-oil containers and was not from a leaking waste-oil container left near the drinking fountain, a seeping 90-weight gear oil dispenser, a spill from the 10-40 weight bulk storage tank, the leaking of the hydraulic racks in the bays ten feet to the south or from oil tracked on the soles of mechanic's shoes from the bays where oil changes and other servicing was occurring. This Court has repeatedly held that jurors ought not be permitted to engage in such speculation and conjecture.

POINT II

PLAINTIFF CANNOT CREATE A TRIABLE ISSUE OF FACT BY FILING AN AFFIDAVIT CONTAINING CONCLUSIONARY ALLEGATIONS IN CONTRADICTION OF PLAINTIFF'S PRIOR DEPOSITION TESTIMONY

Recognizing the failure of the facts presented by plaintiff in his deposition to present a triable issue on proximate cause, plaintiff's counsel filed at the time of the hearing on the Motion for Summary Judgment an affidavit of plaintiff which contradicted the clear and unequivocal testimony quoted above with the following conclusionary allegations:

2. On November 21, 1981, I was injured by a fall while using a drinking fountain at Sears Automotive Center in Ogden, Utah.

3. The injury would not have happened but for the fact that the drinking fountain and oil drain were placed so close to each other than an accident was inevitable.

4. I believe the poor placement of the drinking fountain next to the oil drain was the principal cause of my injury.

(R. 148).

This Court stated in Reagan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d 776, 779 (Utah 1984) that:

> A major purpose of summary judgment is to avoid unnecessary trial by allowing the parties to pierce the pleadings to determine whether there is a genuine issue to present to the fact finder. In accordance with this purpose, specific facts are required to show whether there is a genuine issue for trial. The allegations of a pleading or factual conclusions of an affidavit are insufficient to raise a genuine issue of fact.

Similarly, in Webster v. Sill, supra at 1172, this Court stated:

> To raise a genuine issue of fact, an affidavit must do more than reflect the affiant's opinions and conclusions." Walker v. Rocky Mountain Recreation, 29 Utah 2d 274, 508 P.2d 538 (1973). The affidavit must "set forth specific facts" showing there is a genuine issue for trial. Utah R.

> Civ.P. 56(e). The mere assertion that an issue of fact exists without a proper evidentiary foundation to support that assertion is insufficient to preclude the granting of a summary judgment motion. Leininger v. Stearns Rogers Mfg., 17 Utah 2d 37, 404 P.2d 33 (1965); Foster v. Steed, 19 Utah 2d 435, 432 P.2d 60 (1967).

Paragraphs 3 and 4 of the affidavit of plaintiff are clearly conclusionary and insufficient to raise a genuine issue of fact. Each of the above quoted paragraphs is contradictory of plaintiff's prior deposition testimony. In Webster v. Sill, supra, this Court stated that a party may not raise an issue of fact by an affidavit which contradicts previous deposition testimony unless it appears to some substantial likelihood that the deposition testimony was in error for reasons which appear in the deposition or an adequate explanation for the contradiction is contained in the affidavit. 675 P2d at 1172-73. In this case, plaintiff has not explained the contradictions between his affidavit and deposition testimony and, while correcting other testimony, plaintiff did not change his deposition testimony when preparing his errata sheet. This Court must, therefore, disregard paragraphs 2, 3 and 4 of plaintiff's affidavit. As this Court recognized in Webster v. Sill, "[a] contrary rule would undermined the utility of

summary judgment as a means of screening out sham issues of fact." 675 P.2d at 1173.

CONCLUSION

The Honorable Judge David E. Roth's Summary Judgment in favor of defendants and third-party defendant should be affirmed.

DATED this 6 day of March, 1987.

JONES, WALDO, HOLBROOK & McDONOUGH

By Craig R. Mariger
Craig R. Mariger, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I served four true and correct copies of the foregoing Brief of Respondent Van Boerum & Frank Associates, Inc. upon the following parties by causing the same to be mailed first class, postage prepaid, on the 6 day of March, 1987 to:

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ADDENDUM

Transcript on Appeal, Summary Judgment hearing, August 20, 1986.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF UTAH, IN AND FOR WEBER COUNTY

DENNIS COOK, Plaintiff, -vs- CHRISTIANSON BROTHERS CONSTRUCTION, INC., et al, Defendant	)	TRANSCRIPT ON APPEAL Civil No. 94076

BE IT REMEMBERED that the above entitled matter came on for hearing before the HON. DAVED E. ROTH, Judge of the above entitled Court, sitting without a Jury, on August 20, 1986.

WHEREUPON, the following proceedings were had, to wit:

A p p e a r a n c e s:

JACK HELGESEN, ESQ.,

Attorney for Plaintiff;

RAYMOND BERRY, ESQ.,

Attorney for Defendant

THE COURT: I am going to grant the Motion for Summary Judgment.

The facts, apparently undisputed facts, are that the Plaintiff simply slipped and fell in a garage area. Had oil on his shoes. There was oil on the floor. Apparently oil all over the area of the garage.

The Plaintiff claims that the causation or proximate causation of the accident was the negligent design and construction whereby the sump was located within 18 inches of the water fountain. I don't buy the argument. I don't think the sump location and the water fountain location being 18 inches apart is the cause of this accident. Citing specifically the Cook vs. Mortenson case, I believe this most appropriately is in line with the facts in this case supporting the decision. I think it would be a waste of time to send this case to trial.

MR. BERRY: Thank you, your Honor. Should I prepare the Order?

THE COURT: Get together between the four of you and decide who prepares the Order. Circulate it among all parties.

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C E R T I F I C A T E

STATE OF UTAH)
) ss.
County of Weber)

I, James N. Jones, do hereby certify that I am one of the Official Court Reporter for the State of Utah, and a competent machine shorthand writer;

That I reported in machine shorthand the proceedings had in the matter of Dennis Cook vs. Christianson Brother Construction, Inc., et al, on August 20, 1986.

That thereafter, I reduced a portion of my machine shorthand notes to typewriting, and the foregoing transcript, page 2, constitutes a full, true and correct transcript of Judge Roth's ruling in the above entitled matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 4th day of March, 1987.

James N. Jones
Official Court Reporter